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Should Legal Malpractice Insurance Be Mandatory?

INTRODUCTION

As malpractice claims against lawyers multiply at an alarming rate, individual attorneys are becoming increasingly concerned about having to defend possible malpractice claims against them and meeting the spiraling cost of legal malpractice insurance. State bar associations and the American Bar Association are currently studying what can be done about the situation.¹ As proposals to increase the availability and reduce the cost of malpractice insurance have been explored, it has been suggested that legal malpractice insurance coverage be required as a necessary condition to the practice of law.²

This Comment will explore background material on the question of making legal malpractice insurance mandatory and include responses to a questionnaire on legal malpractice insurance that was submitted to all state bar associations. Recent relevant experiences of foreign and state bar associations will be discussed, and arguments for and against a mandatory legal malpractice insurance proposal will be examined. In addition, the possible effects and problems of a mandatory program will be considered.

I. CLIENTS' SECURITY FUNDS

A review of the establishment of clients' security funds is an appropriate starting point for a discussion of mandatory legal malpractice insurance for two reasons: (1) clients' security funds were designed to complement legal malpractice insurance coverage, and (2) the arguments for and against clients' security funds and mandatory legal malpractice insurance are similar. Since 1959, state and local bar associations have established funds to compensate clients for the dishonest acts of their attorneys.³ Some of these funds are financed by mandatory contributions from all association members. Others are funded voluntarily. Although forty-eight states and the District of Columbia currently

1. See Jericho & Coultas, *Are Lawyers an Insurable Risk?*, 63 A.B.A.J. 832, 835-36 (1977); Woytash, *Lawyer Malpractice: Is a Crisis Coming?*, B. LEADER, Oct. 1976, at 18.

2. See W. Gates, *Mandatory Malpractice Insurance for Lawyers* (Feb. 21, 1975) (paper presented at the meeting of the National Conference of Bar Presidents) (Gates is chairman of the ABA Special Committee on Lawyers' Professional Liability).

3. Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A.J. 757, 757 (1969).

have such funds,⁴ opinions originally were strongly divided over the wisdom of their establishment.

Attorneys favoring the establishment of clients' security funds saw meeting a moral obligation to the public and the profession as a primary reason for the funds.⁵ Such a fund, it was argued, was necessary in order to uphold the integrity and dignity of the profession.⁶ Moreover, it was contended that a clients' security fund would improve the bar's reputation by compensating clients for their lawyers' dishonesty.⁷ A third reason given was that the bar's failure to recognize its responsibility to the public in this area would result in public pressure toward legislation for such protection.⁸

Commentators opposing clients' security funds replied that attorneys had no duty to pay for the defalcations of other lawyers.⁹ Why should honest lawyers pay for the acts of dishonest attorneys? It would be better, these commentators argued, for the bar to use its energies in screening those admitted to the bar.¹⁰ The existence and operation of the funds arguably would publicize the dishonesty of lawyers and worsen public relations.¹¹ Charges that such plans were unnecessary¹² and would result in added expense to individual lawyers were also made.¹³ Moreover, the availability of such plans would possibly increase both dishonesty charges against members of the bar and actions for malpractice.¹⁴

As evidenced by the overwhelming number of states that have adopted clients' security funds, it is apparent that the legal profession was more persuaded by the arguments favoring the funds' establishment. Although many of the same arguments

4. Telephone interview with James H. Bradner, Assistant Director, Center for Professional Discipline, American Bar Association (Sept. 15, 1977) (notes on file in the office of the *Brigham Young University Law Review*).

5. See, e.g., Smith, *The Client's Security Fund: "A Debt of Honor Owed by the Profession"*, 44 A.B.A.J. 125 (1958); Sterling, *The Argument for a Clients' Security Fund*, 36 CAL. ST. B.J. 957, 957 (1961); Voorhees, *The Case for a Clients' Security Fund*, 42 J. AM. JUD. SOC'Y 155, 157 (1959).

6. See, e.g., Atkins & Kane, *Clients' Security Fund Maintains Bar's Integrity*, 44 FLA. B.J. 130, 132 (1970); Scott, *Some Pros and Cons of the Client Security Fund Proposal*, 22 THE SHINGLE 17, 18 (1959).

7. Sterling, *supra* note 5, at 958.

8. *Id.* at 959.

9. See, e.g., McKnight, *The Argument Against Clients' Security Fund*, 36 CAL. ST. B.J. 963 (1961); Scott, *supra* note 6, at 18.

10. McKnight, *supra* note 9, at 963.

11. See *id.* at 964.

12. See Sterling, *supra* note 5, at 959.

13. McKnight, *supra* note 9, at 966.

14. *Id.* at 965.

apply equally to the question of mandatory malpractice insurance, it is important to note that clients' security funds were not established to cover lawyer negligence as does malpractice insurance but rather to compensate for attorney defalcations. John W. Bryan, Jr., former chairman of the Louisiana and ABA committees on clients' security funds, has made this clear:

The Clients Security Fund is not a substitute for professional liability insurance as it does not cover negligence which is the risk insured against by the lawyer under the so called malpractice policy.

Clients of lawyers with professional liability policies have no rights against the policy carrier because the standard form of policy excepts defalcation. The Clients Security Fund is a supplement to the malpractice insurance except that it is not in the nature of insurance but is a fund available for payments approved by the committee purely as a matter of grace and not of legal obligation either of the fund or the bar association.¹⁵

Bryan's observation makes it evident that clients' security funds were designed to complement legal malpractice insurance coverage. Bryan has emphasized this interrelationship and the need for mandatory legal malpractice insurance to complete the security of the client:

The theory of both the American and British funds is that a client is relegated to the malpractice insurance of the lawyer or to the lawyer's own resources in the case of the negligent handling of a client's matter as distinguished from a defalcation.

It may be that some lawyers do not have this coverage. This insurance should be made compulsory as a condition of the privilege of practicing law and as a way of completing the security of the client.¹⁶

Theoretically, then, a client would be protected from an attorney's negligence by legal malpractice insurance and from defalcations by a clients' security fund. Unfortunately, this ideal of complete protection has not yet been realized.

II. SURVEY RESULTS

Although nearly all state bar associations have provided protection against a lawyer's defalcations with a clients' security fund, there is none that presently requires malpractice insur-

15. Bryan, *The Clients Security Fund in Louisiana—A Status Report*, 16 LA. B.J. 141, 145 n.3 (1968).

16. Bryan, *supra* note 3, at 760.

ance.¹⁷ It is likely that as the number of malpractice claims against lawyers increase, especially against uninsured attorneys, state bar associations in the near future will give greater attention to the question of mandatory legal malpractice insurance. To ascertain the current opinions of state bar associations on the question of mandatory legal malpractice insurance and other related issues, a questionnaire entitled "Yes-No Questions on Legal Malpractice Insurance" was sent to the executive directors of all state bar associations on September 27, 1977. In states that had both a voluntary and a unified bar,¹⁸ the questionnaire was sent only to the unified bar. Forty-seven of the fifty state bar associations responded.¹⁹ The results of the survey are summarized as follows:²⁰

Questions	Number of Responses			
	Yes	No	Don't Know	No Response
1. Is your bar association in favor of mandatory legal malpractice insurance?				
a. members of the bar generally	4	10	32	1
b. members of the governing board	7	11	26	3
2. Does your bar association predict that mandatory legal malpractice insurance will significantly increase malpractice claims against attorneys?				
a. members of the bar generally	3	1	41	2
b. members of the governing board	4	8	31	4
3. Does your bar association sponsor a legal malpractice insurance program?	42	5	--	0
4. Does your bar association have any plans to become self-insuring?	22 ²¹	19	5	1

17. Oregon will require legal malpractice insurance on July 1, 1978. See notes 49-53 and accompanying text *infra*.

18. North Carolina, Virginia, and West Virginia. See AMERICAN BAR ASSOCIATION, 1977/78 DIRECTORY 3G-5G (1977).

19. The bar associations of Minnesota, New Mexico, and Oklahoma did not respond.

20. The *Review* gratefully acknowledges the assistance of Larry C. Farmer, Rodney Jackson, and Gerald R. Williams in the preparation of the questionnaire and in the compilation of the responses.

21. "Yes" answers include nine responses such as "studying self-insurance," etc.

5. Does your bar association have a clients' security fund?	44 ²²	3	—	0	
If yes, are you satisfied with your clients' security fund?	34	9	—	4	
Are contributions to your clients' security fund mandatory?	34 ²³	10	—	3	
				Number of Responses	
				Company	
6. Which insurance companies underwrite legal malpractice insurance in your state?				American Home Assurance Company	26
				American Bankers Insurance Company of Florida	22
				St. Paul Fire and Marine Insurance Company	8
				Continental Casualty Company (CNA)	3
				Lloyd's of London	2
				GATX Insurance Company	1
				Gulf Insurance Company	1
				Phoenix Insurance Company	1
				Transamerica Insurance Group	1
				Percent	Number
7. Approximately what percentage of your attorneys are covered by legal malpractice insurance? ²⁴				0-29	0
				30-39	5
				40-49	3
				50-59	6
				60-69	11
				70-79	4
				80-85	6
				No Response	12

The large number of "Don't Know" responses to questions 1 and 2 suggests a surprising lack of research and policy formulation concerning legal malpractice insurance. Many state bars

22. "Yes" answers include cases where the clients' security fund is administered by the state supreme court rather than by the bar.

23. "Yes" answers include cases where part of an attorney's dues or part of the bar budget goes to support the clients' security fund.

24. Using the estimates provided by the state bar executive directors and the number of attorneys given in AMERICAN BAR ASSOCIATION, 1976-1977 DIRECTORY OF BAR ASSOCIATIONS (1976), it is estimated that 55.42% of the attorneys in the 35 states responding carry malpractice insurance (149,190 out of 269,214). There is no external source to validate this estimate. An article published in 1970 cites various national estimates ranging from below 50% to above 90%. Denenberg, Ehre, & Huling, *Lawyers' Professional Liability Insurance: The Peril, the Protection, and the Price*, INS. L.J., July 1970, at 392.

apparently have not yet confronted the issue of mandatory malpractice insurance. Of the bar associations which answered either yes or no to question 1, there was a split of opinion between the governing boards, with more opposing than favoring mandatory insurance. According to the estimates of the executive directors, bars with members generally opposing mandatory insurance outnumbered bars with members generally favoring such a proposal by more than two to one. When coupled with the finding that fewer than fifty-six percent²⁵ of all attorneys have malpractice insurance, it appears that many attorneys prefer the risk of "going bare" to the cost of either voluntary or mandatory insurance.

Although there were many "Don't Know" responses to the questionnaire, certain correlations that can be inferred from the survey results help suggest why a particular bar association would be in favor of or opposed to mandatory insurance. One informative relationship is that between bar size and support for or opposition to mandatory insurance. This correlation is shown in Table 1.

TABLE 1.—*Attitudes of bar members and governing boards toward mandatory legal malpractice insurance as a function of bar size*

Bar Size ²⁶	Bar Members			Governing Boards		
	Favoring	Opposing	No Opinion ²⁷	Favoring	Opposing	No Opinion
0-2000	0	5	8	2	6	5
2000-5000	1	1	10	2	2	8
5000-10,000	1	3	6	1	3	6
over 10,000	2	1	8	2	0	7
Total	4	10	32	7	11	26

As Table 1 indicates, attorneys in bars with less than 2000 members reportedly are generally opposed to the idea of mandatory insurance. The least opposition and strongest support for mandatory insurance was reported among lawyers in bars with memberships over 10,000. By contrast, bar size was not as closely related to the governing boards' support for mandatory insurance as it was to the reported general opinions of bar members. Governing

25. See note 24 *supra*.

26. This category was based on the number of attorneys given in AMERICAN BAR ASSOCIATION, note 24 *supra*.

27. The "No Opinion" category of Tables 1, 3, and 5 includes only "Don't Know" responses.

board *opposition* to mandatory insurance, however, was inversely related to bar size.

The correlation between bar size and membership support for mandatory insurance may be the result of two factors. First, insurance administration costs and underwriting losses in a large bar can be distributed over a larger base, making mandatory insurance more feasible. Second, a bar association's ability to recognize intrinsic problems and to devise solutions may be related to bar size. In showing a high correlation between bar size and associations with plans to become self-insuring, other survey results, set out in Table 2, partially support this latter assertion.²⁸

TABLE 2.—*Number of bar associations with plans to become self-insuring as a function of bar size*

Bar Size	Bars with plans	Bars without plans ²⁹
0-2000	1	10
2000-5000	7	5
5000-10,000	6	3
over 10,000	8	1
Total	22	19

Almost seventy-three percent³⁰ of the bars with memberships over 10,000 reported plans to become self-insuring; less than eight percent³¹ of the bars with less than 2000 members reported self-insurance plans.

A correlation, similar to that between bar size and support for mandatory insurance, may also be seen between bar type (unified, voluntary, or partially unified) and support for mandatory insurance. As Table 3 shows, members of nearly fourteen percent of the twenty-nine unified bars reporting members' opinions were generally in favor of requiring legal malpractice insurance. The members of no voluntary bars were reported as generally favoring mandatory insurance.

28. This assumes, of course, that having a plan to become self-insuring demonstrates a bar's "ability to recognize intrinsic problems and to devise solutions."

29. The "Bars without plans" category of Tables 2, 4, and 5 does not include cases where either a "Don't Know" or no response was made to the question.

30. Of 11 bars with memberships over 10,000, eight reported plans to become self-insuring.

31. Only one bar association (Idaho) out of 13 bars with memberships under 2000 reported plans to become self-insuring.

TABLE 3.—*Attitudes of bar members and governing boards toward mandatory legal malpractice insurance as a function of bar type*

Bar Type ³²	Bar Members			Governing Boards		
	Favoring	Opposing	No Opinion	Favoring	Opposing	No Opinion
Unified	4	6	19	7	6	14
Voluntary	0	3	13	0	4	12
Partially Unified	0	1	0	0	1	0
Total	4	10	32	7	11	26

Table 3 also shows that among the governing boards of unified bars almost the same number of boards support the idea of mandatory insurance as reportedly oppose it. No voluntary bar governing boards, however, were reported as favoring a mandatory program.

One possible reason why neither the general memberships nor the governing boards of voluntary associations were reported in favor of mandatory insurance is the fact that a mandatory program is rather impractical where membership is on a voluntary basis.³³ A voluntary bar's governing board has little power to coerce the association's members to participate in a mandatory program. Such a program could also decrease new memberships in a voluntary bar.

Another pattern derivable from the survey data is the relationship between bar type and a bar's plans to become self-insuring. This correlation is shown in Table 4.

TABLE 4.—*Number of bar associations with plans to become self-insuring as a function of bar type*

Bar Type	Bars with plans	Bars without plans
Unified	16	11
Voluntary	6	7
Partially Unified	0	1
Total	22	19

32. Classification of type of bar was based on AMERICAN BAR ASSOCIATION, *supra* note 18, at 1G-5G.

33. Illinois State Bar Association reply to questionnaire. All responses to the questionnaire are on file in the office of the *Brigham Young University Law Review*.

As Table 4 indicates, of the bar associations reporting plans to become self-insuring, nearly seventy-three percent are unified bars. The near-even split among voluntary bars over self-insurance plans may again be explained by the lack of power of voluntary bar governing boards to require membership participation.

The survey results indicate that bars with plans to become self-insuring are more likely to favor mandatory malpractice insurance. If a bar plans to self-insure, there must be a fairly large number of participants to make the program feasible.³⁴ In light of the correlation between bar size and reported membership support for mandatory insurance, it is not surprising then that those bars considering self-insurance would also be likely to favor mandatory participation. Table 5 shows this result.

TABLE 5.—*Number of bar associations with plans to become self-insuring as a function of the attitudes of bar members and governing boards toward mandatory legal malpractice insurance*

Attitudes toward mandatory insurance	Bars with plans	Bars without plans
Bar Members		
Favoring	4	0
Opposing	4	5
No Opinion	14	13
Total	22	18
Governing Boards		
Favoring	5	2
Opposing	4	6
No Opinion	11	10
Total	20	18

The survey also showed that bars requiring contributions to their clients' security funds were much more likely to be satisfied with those funds than were bars with voluntary-participation funds. Of the bars responding to the question on satisfaction with clients' security funds, nearly eighty-five percent of the bars with mandatory programs were satisfied; by way of contrast, only sixty percent of those bars with voluntary programs were satisfied. These results are shown in Table 6.

34. To the extent that feasibility of a self-insurance program is reflected in the plans of a bar association, this assertion is supported by the survey results in Table 2. See text accompanying note 28 *supra*.

TABLE 6.—*Number of bar associations satisfied with their clients' security funds as a function of the type of contribution to clients' security fund*

Type of contribution	Bar satisfied	Bar not satisfied
Mandatory	28	5
Voluntary	6	4
Total ³⁵	34	9

To the extent that satisfaction indicates success, the success of a clients' security fund apparently may be dependent on whether contributions to the fund are required.³⁶ This dependency suggests that a malpractice insurance program to be successful would also need to be mandatory. This would be especially true where a bar self-insures because of the necessity of having a sufficient base over which to spread the risks. In light of the low percentage of attorneys presently either carrying malpractice insurance or favoring the institution of mandatory insurance, it is unlikely that a voluntary program of bar-sponsored insurance would gain sufficient support to be successful.

The fact that there were so many "Don't Know" responses to the questionnaire suggests a greater need for exploration of the legal malpractice insurance problem. Considerable current awareness of the mandatory insurance proposal, however, is indicated by the fact that eighteen state bar executive directors gave definite responses to the survey question regarding bar governing board support for or opposition to the proposal. Although increased interest and research in this area are likely, it is difficult to predict whether the result will be adoption or rejection of mandatory programs.

III. RECENT EXPERIENCES IN MANDATORY LEGAL MALPRACTICE INSURANCE

Although relatively few state bar associations are in favor of mandatory malpractice insurance, three states have attempted to adopt mandatory programs; one state bar has succeeded. In addition, some foreign bar associations have required attorneys to

35. Four bars did not respond to the question regarding satisfaction with clients' security funds.

36. See Amster, *Clients' Security Funds: The New Jersey Story*, 62 A.B.A.J. 1610, 1610 (1976).

obtain legal malpractice insurance coverage. This section reviews the experiences of these foreign and state bars.

A. *British Columbia*³⁷

Faced with dramatic increases in the cost of legal malpractice insurance, the Law Society of British Columbia developed a program to obtain insurance coverage for its members at reasonable rates. The Society had as its primary purpose the protection of its members. It realized, however, that the public would also be protected if every attorney was adequately insured.

The Society recognized that, in order to implement and control a malpractice insurance program, more was necessary than merely requiring each attorney to obtain malpractice coverage. Because the refusal of insurance companies to insure an attorney would bar him from practicing law, merely requiring each Society member to carry malpractice coverage would be equivalent to placing the power of deciding who would practice law in the hands of private insurance companies. In response to this problem, the Society implemented a mandatory program³⁸ under which all members would be insured by one insurer, but within which the Law Society and not the insurer would decide who was to be exempted or excluded.

The program is partially self-insured, with the Law Society and the insured attorney jointly paying the first portion of every claim. The policy limit is \$100,000³⁹ per claim. Of this amount, each member pays a \$3000 deductible per claim. The Society then pays the next \$22,000 (in essence a \$25,000 deductible to the insurer), and the insurer pays the remaining \$75,000. The Society's losses in any policy year are limited to \$500,000. Any losses in excess of this limit are paid by the insurer regardless of the amount.⁴⁰

The program provides malpractice coverage to all the So-

37. The information in this section is based on a letter from and telephone interview with T.V. McCallum, Secretary of the Law Society of British Columbia. Letter from T.V. McCallum to Thomas L. Kay (Oct. 14, 1977) (on file in the office of the *Brigham Young University Law Review*); telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file).

38. The Canadian law societies have far more power to implement programs than do their American counterparts. They need no judicial or legislative approval to put a plan such as mandatory insurance into effect. Telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file in the office of the *Brigham Young University Law Review*).

39. All dollar amounts in this section are in Canadian currency.

40. The insured attorney must still pay the first \$3000 of each claim, however. Telephone interview with T.V. McCallum (Feb. 20, 1978) (notes on file in the office of the *Brigham Young University Law Review*).

ciety's members at a very reasonable cost. Before the program went into effect on January 1, 1971, with Travelers Insurance Companies as the carrier, only forty percent of the Society's members had malpractice coverage. Today, except for those who are exempted from the insurance requirement, such as government and corporation employees, each member of the Society has \$100,000 per claim coverage for \$300 per year.⁴¹ Out of this \$300 assessment, the Law Society pays both the program's operating costs and the insurer's premium⁴² and covers the \$500,000 loss limit.

The Society's involvement in the program, both in a financial sense and through an active loss prevention program, demonstrates to the insurer that the Society and its members take a strong interest in the viability of the insurance program. The Society's involvement has made it possible to identify the sources of claims and to implement effective loss prevention measures. For example, after finding that thirty-three percent of all claims (fifty percent in dollar figures) arose from statute of limitations problems, especially the one-year statute of limitations of British Columbia's motor vehicle act, the Law Society devised and marketed a diary system that could be implemented in each law office. The Society also lobbied to increase the motor vehicle act statute of limitations period from one year to two years. Another thirty percent of claims were found to come from title search problems. In response to this problem, the Society developed a title search form for its members. Problems with mechanic's liens constituted the third largest number of claims. The Society has warned its members against the pitfalls of the mechanic's lien act and has also lobbied for its change.

In addition to mandatory insurance, the Law Society has a Special Fund, equivalent to a clients' security fund, that reimburses clients for the dishonest acts of their lawyers. The Society has noted an improvement in its public image since the adoption of the Special Fund and mandatory insurance. The public is now assured that no client will be unprotected. Knowledge of the insurance requirement by the public and by attorneys, however, has apparently led to an increase in the number of malpractice claims. This increase may also be explained by the fact that some

41. Additional coverage can be obtained for a modest cost. For example, an extra \$900,000 coverage over the \$100,000 mandatory limit would cost \$160 per year. Thus, \$1,000,000 of coverage would cost \$460 per year.

42. Since 1976 the insurer has been GESTAS, a Canadian consortium of eight insurance companies operating out of Montreal.

lawyers may have become more careless in their practice because they know they are covered by insurance.⁴³

The British Columbia Law Society feels that its program has been very successful on the whole. Nonexempt members and their clients are protected for what is reported to be one-sixth to one-seventh the cost of equivalent, individually acquired coverage written by a commercial carrier. Because of the success of the British Columbia program, nine of the ten other Canadian law societies have adopted similar mandatory programs.⁴⁴

B. Norway⁴⁵

The Norwegian Clients' Compensation Fund encompasses coverage for both malpractice and dishonesty. Established by the Norwegian Bar Association (Den Norske Advokatforening) in 1969, the fund is, in effect, a combined malpractice insurance program and clients' security fund. The fund is controlled by a council of three members, two appointed by Den Norske Advokatforening and one appointed by the Ministry of Justice. The program, administered by the Secretariat of Den Norske Advokatforening, requires each lawyer to contribute approximately \$40 per year.

The fund is to be used in the council's discretion to cover any liability that a lawyer may incur as a result of his own or his firm's illegal conduct in the course of professional activities. Claims due to negligence may also be met by this fund. In order to be granted any compensation from the council, however, the client must first establish in court the attorney's liability for the dishonest or negligent act. After establishing the legal basis for the claim, the client may apply to the council for compensation. The council then determines the amount of compensation to be paid, if any. Generally, full compensation will be paid if the fund has the means to do so. The council's decisions are final and cannot be appealed in the courts. After compensating the client, the fund has the right to make a claim against the lawyer concerned.

43. The first \$3000 of each claim must still be paid by the insured lawyer, however.

44. The Bar of Quebec has not adopted a mandatory program. Telephone interview with T.V. McCallum (Feb. 20, 1978) (notes on file in the office of the *Brigham Young University Law Review*). Reportedly, the programs adopted by the other nine law societies (including the one established by the Chamber of Notaries in Quebec) have experienced results similar to those of British Columbia. Telephone interview with T.V. McCallum (Oct. 19, 1977) (notes on file).

45. The information in this section is based on a letter from Kristen S. Fari, Secretary of Den Norske Advokatforening. Letter from Kristen S. Fari to Thomas L. Kay (Sept. 20, 1977) (on file in the office of the *Brigham Young University Law Review*).

C. *Washington*⁴⁶

Washington was apparently the first state to consider implementation of a mandatory malpractice insurance program. In 1973, the Board of Governors of the Washington State Bar made a firm decision to institute such a program. A poll that year of the bar's membership had shown that seventy-two percent of those attorneys responding were in favor of the idea of mandatory malpractice insurance. The local bar presidents approved the idea in 1974 and urged its implementation. The State Bar Insurance Committee, however, was neither willing nor prepared to effectively implement the program at that time.

The Board of Governors instead instructed the bar staff to explore the alternatives available in the market place. Many insurance brokers made presentations to the staff. Some brokers had fully developed plans; others suggested that the Board of Governors select an experienced broker and then take some time to develop specifications before signing up a carrier. The Board decided to take the latter approach.

A Board committee was formed and, together with a broker, developed a plan that was later accepted by the Argonaut Insurance Company. The plan's essential elements were announced to the bar in August 1974. The program was to provide \$1,000,000 coverage, with no deductible, for an annual premium of \$155. The policy year and mandatory requirement were to begin on February 1, 1975. The policy, an "occurrence" and not a "claims made" type,⁴⁷ would not have given the insurer the right of individual cancellation. The insurer was committed to underwrite the program for two additional years with no more than a ten percent premium increase.

In conjunction with this announcement, the Board of Governors recommended that the Washington Supreme Court adopt a new rule requiring malpractice insurance coverage as a condition of practicing law. Bylaws were also established to make the program effective February 1, 1975, and to exempt certain attorneys from the insurance requirement. Those opposing the program made presentations to the court. One large county bar association

46. The information in this section is based on that in W. Gates, note 2 *supra*.

47. An "occurrence" type of policy covers acts, errors, or omissions committed during the policy period regardless of when the claim is made. A "claims made" type of policy, by contrast, covers acts, errors, or omissions for claims presented during the policy period. For a discussion of the advantages and disadvantages of these two types of policies, see R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* §§ 459-460 (1977); Comment, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A. L. REV. 925 (1975).

adopted a resolution opposing the program.

Before the debate could be resolved, however, a death blow was struck to the program when, in late October 1974, Argonaut was forced to withdraw because its parent corporation, Teledyne, had suffered enormous underwriting and investment losses. As a result, the mandatory program had to be postponed. The Washington Supreme Court was requested to defer its action on the proposed rule. A second poll was then conducted to determine the feelings of the bar's membership. Of the 2,830 attorneys who responded (out of 6,000 members), sixty-three percent were in favor of requiring legal malpractice insurance; however, only forty-two percent wanted the Board of Governors to continue its efforts to develop a compulsory insurance contract with a single carrier. Presently the Washington State Bar Association is considering the possibility of self-insurance.⁴⁸

D. Oregon⁴⁹

The Oregon State Bar has gone further than any other state bar association in implementing a mandatory legal malpractice insurance program. At their 1976 annual meeting, the members of the bar voted to authorize the Board of Governors to seek legislation authorizing a compulsory liability fund. The bill drafted and sponsored by the Board, Senate Bill 190, was passed by the Oregon Legislature and signed into law by Governor Straub in mid-1977. The new law authorizes the Board of Governors "to require all active members of the state bar engaged in the private practice of law in Oregon to carry professional liability insurance"⁵⁰

The Board responded to the law's enactment by adopting a resolution establishing the Oregon State Bar Professional Liability Fund. The resolution requires "all active members of the Oregon State Bar engaged in the private practice of law" to carry, beginning July 1, 1978, "professional liability coverage with aggregate limits of not less than \$100,000"⁵¹ that will be offered by the Professional Liability Fund. The fund, to be managed by a Board of Directors consisting of seven active members of the Oregon State Bar engaged in private practice and appointed by the Board of Governors, will evaluate, investigate, negotiate, and de-

48. WASH. ST. B. NEWS, June 1977, at 19.

49. The information in this section is largely based on Statement of the Board of Governors, Oregon State Bar, Professional Liability Fund (1977 Annual Meeting).

50. ORE. REV. STAT. § 9.080(1) (1977).

51. Statement of the Board of Governors, *supra* note 49, at 8.

fend claims. The initial assessment for the period from July 1 through December 31, 1978, will be \$250 per lawyer. New lawyers admitted to practice after September 1, 1977, will be assessed \$125. Coverage will be on a "claims made" basis with a \$100,000 limit on all claims arising out of the same act, subject to a maximum liability of \$200,000 per coverage period. House counsel, public defenders, legal aid lawyers, and government attorneys will be excluded from the insurance requirement.⁵² In addition, patent lawyers will be required to furnish evidence of comparable coverage with a private carrier, although they will not be required to subscribe to the fund.

The Oregon Bar anticipates that the plan will produce greater protection of the clients and the public, greater protection for the lawyer, and continued availability of professional liability protection at a reduced cost.⁵³ The absence of a profit factor and the utilization of a detailed recordkeeping system and loss prevention program should result in the Professional Liability Fund costing attorneys far less than comparable commercial insurance. Other reasons for reduced costs are the elimination of advertising costs and brokers' commissions, the elimination of unnecessarily large accumulations of reserves, and broad participation by all attorneys to spread the costs.

The experience of the Oregon State Bar in the future will be helpful to other state bar associations in formulating their own mandatory insurance programs. The success of the Oregon program is likely to influence other bars to implement mandatory self-insurance programs. Under a program like Oregon's Professional Liability Fund, mandatory coverage will be necessary to provide an adequate base over which to spread the risks.

E. California

California, like Oregon, attempted to create an alternative to private insurance. However, where Oregon succeeded, California failed. California's attempt came in the form of a bill sponsored in the state legislature by Assemblyman John T. Knox.⁵⁴ Knox's Assembly Bill 209 was designed to offer relief from the high cost of malpractice insurance by establishing the California Client Protection Fund, a public corporation that would exist within the

52. See ORE. REV. STAT. § 9.080(4) (1977).

53. ORE. ST. B. BULL., Aug. 1977, at 6.

54. See Knox, A.B. 209: "Alternative to Private Insurance", STATE B. CAL. REP., July 1977, at 1, 4.

state's judicial branch of government. This fund was to be maintained by requiring yearly contributions from the bar. Unlike private insurance, most of which is written on a "claims made" basis, contributions would be based on the amount paid out to clients in the previous year. This "claims paid" formula was a unique idea to professional liability coverage. The first-year (1978) contribution was to be \$400 per attorney. The limit of coverage was to be \$250,000 per occurrence, with an aggregate total of \$500,000 per contribution period.

Knox's bill sparked a vigorous debate among California attorneys. Knox's supporters, seeing no reasonable alternative to the proposal, viewed the reduced cost to attorneys and the increased public protection as primary reasons for adopting the proposed legislation. The fund should be mandatory, these supporters argued, because it would be unconscionable to allow an attorney to practice without providing for his clients' financial security.⁵⁵

The bill's opponents argued that the plan was being sold on the basis of an artificially low initial contribution. They viewed the "claims paid" structure as being financially unsound. Such a fund, incorporating an extreme cost deferral, has the potential for weakening the legal profession and subjecting it to ultimate state control, they said. Opponents also contended that mandatory participation was undesirable because it forced a lawyer into an "untried social experiment." Other, superior alternatives were said to be available at comparable overall costs.⁵⁶

Assemblyman Knox finally withdrew the proposed Client Protection Fund provision from the bill and converted it into a proposal for a special study of attorney malpractice and client protection. This action came after the Los Angeles and San Diego county bar associations voiced their opposition to the bill and after a statewide attorney plebiscite conducted by the state bar showed that only a slim majority supported the proposal.⁵⁷ Thus diluted, the bill was passed by the California Legislature, but was vetoed by Governor Brown on October 3, 1977. Brown's veto message stated that the bill "contemplates compulsory insurance for one professional group. Compulsory insurance inevitably leads to a state fund, a prospect we should think about long and hard."⁵⁸

55. Cotkin, *Arguments for A.B. 209—Attorneys Professional Responsibility Fund*, STATE B. CAL. REP., July 1977, at 7.

56. Miller, *Arguments Against A.B. 209—Attorneys Professional Responsibility Fund*, STATE B. CAL. REP., July 1977, at 5.

57. STATE B. CAL. REP., Aug. 1977, at 1.

58. Press Release from Office of the Governor of California (Oct. 3, 1977) (quoted in

IV. THE ARGUMENTS

Considering the many state bar associations that have apparently not yet decided to support or oppose the mandatory legal malpractice insurance proposal, a review and analysis of the arguments for and against such a proposal may be valuable. The following arguments will deal mainly with mandatory proposals with one insurer or with self-insurance.⁵⁹

A. *Financial Protection of Clients and Attorneys*

As has been noted above,⁶⁰ legal malpractice insurance completes a client's protection when coupled with an existing clients' security fund. Although it may be unconscionable for a lawyer to practice law without first providing financial security for his clients,⁶¹ many lawyers have chosen to "go bare." It is estimated that less than fifty-six percent of all attorneys have malpractice insurance.⁶² When large numbers of attorneys choose not to provide for their clients' protection, the bar arguably should require that all lawyers obtain insurance coverage as a privilege of practicing law.

Opponents may argue that there are few unsatisfied malpractice claims against lawyers and that a mandatory program should not be imposed where there has been no significant problem. Although unsatisfied claims against lawyers are not yet a matter of general public attention, bar associations need not await "scandal or public outcry" before bringing about needed reform.⁶³ Requiring attorneys to obtain malpractice coverage would assure that no client would go without a remedy for an attorney's negligence.

Requiring malpractice insurance would not only provide financial security to the client but would also protect the attorney. Lawyers engaged in private practice without malpractice insurance risk financial disaster from even a minor inadvertence.⁶⁴ If

STATE B. CAL. REP., Oct. 1977, at 14).

59. Some of the following arguments would be somewhat different if, rather than a mandatory self-insurance or sole-insurer program, there was merely an insurance requirement for all attorneys. Requiring all attorneys to obtain insurance might induce more companies to write legal malpractice insurance policies, thus increasing the number of insurers from which lawyers might choose. An increased number of competing insurance companies soliciting business might arguably result in a reduction in the cost of insurance.

60. Notes 15-16 and accompanying text *supra*.

61. Cotkin, *supra* note 55, at 8.

62. Note 24 *supra*.

63. W. Gates, *supra* note 2, at 2.

64. Neil, *A Realistic Response to the Professional Liability Insurance Problem*, ORE.

the attorney's financial protection were the only consideration, the bar might have no responsibility to require that all lawyers carry malpractice insurance. When coupled with the bar's responsibility to protect the public, however, the protection of the bar's members further justifies implementation of a mandatory program.

B. Cost

Any consideration of a proposal to remedy the existing malpractice insurance situation must deal with the proposal's effect on the cost of insurance.⁶⁵ If a mandatory program is more expensive than existing insurance, the proposal will obviously be far more difficult to adopt. By contrast, a mandatory program less expensive than existing insurance alternatives would come as a welcome relief to the present state of soaring insurance premiums.

Proponents of mandatory insurance argue that a mandatory program will reduce the cost of malpractice coverage. The increase in the number of attorneys insured will spread the risk over a broader base and thus arguably reduce the cost.⁶⁶ Opponents contend that the inclusion of lawyers presently uninsured in the base will not necessarily reduce the cost. It is possible that the lawyers without insurance are actually those most prone to malpractice claims because they are poor risks and cannot afford the resulting high premiums. Requiring these lawyers to have insurance, opponents argue, will make premiums even higher because there will be an increase in the number of claims that will outweigh the advantage of a larger base of insureds.

There are other reasons why coverage should cost less under a mandatory program, however. Administration of a mandatory program would yield information about the sources and causes of malpractice claims. That information could be used to implement loss prevention programs that would have the longrun effect of decreasing the number of claims made.⁶⁷ States that adopt a professional liability fund, such as Oregon's self-insurance plan,

ST. B. BULL., Mar. 1977, at 5. See also Dixon, 'Going Bare' May Be Hazardous to Your Fiscal Health, J. LEGAL MED., Nov.-Dec. 1976, at 23.

65. This section will deal only with the cost of insurance to attorneys. Arguably, the cost of services to clients should also be considered since under a mandatory program a client who wanted to save money and was willing to bear the risk of employing an uninsured attorney would be prevented from doing so. It is unlikely, however, that the cost of services to a client would vary greatly between insured and uninsured attorneys.

66. Note 53 and accompanying text *supra*.

67. W. Gates, *supra* note 2, at 4. See also text accompanying note 74 *infra*.

would also have decreased costs because of the elimination of advertising expenses, profit margins, brokers' commissions, and unnecessary reserves.⁶⁸

Opponents also maintain that knowing the existence of compulsory coverage will cause people who might not otherwise make a claim to do so.⁶⁹ Lawyers, they argue, will be less hesitant to bring actions against other lawyers. The number of increased claims from these two sources will in turn increase premiums. The experience of British Columbia has shown that mandatory coverage may be accompanied by increased claims.⁷⁰ Even with an increase in the number of claims, however, lawyers in British Columbia pay substantially less for insurance than they reportedly would if they had to obtain coverage without a mandatory program.⁷¹ The Oregon State Bar also projects a dramatic decrease in costs with its mandatory program.⁷²

C. *Public Image*

The self-imposition of an insurance requirement in recognition of the public interest, it is argued, will improve the bar's public image⁷³ by making certain that the public will be compensated for attorney malpractice. A bar-imposed mandatory program covering all lawyers will show that attorneys are sincerely interested in the welfare of their clients and the public.

Pointing to the problem of increased claims caused by public awareness of insurance coverage, opponents may argue that making malpractice coverage compulsory is a public admission by the bar that attorneys are often negligent. It seems more probable, however, that any detrimental effect such an "admission" might

68. See text accompanying note 53 *supra*.

69. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, AMERICAN BAR ASSOCIATION, *LEGAL MALPRACTICE INSURANCE: A PRIMER FOR THE ORGANIZED BAR* 153 (1977). See also Johnson, *Malpractice: My One-man Battle to Go Bare*, MED. ECON., Feb. 7, 1977, at 120.

70. See Letter from T.V. McCallum to Thomas L. Kay (Oct. 14, 1977) (on file in the office of the *Brigham Young University Law Review*). Each state bar may also determine if establishing a clients' security fund has increased dishonesty claims against lawyers.

71. See *id.*

72. See text accompanying note 53 *supra*.

Related to the cost argument is the contention that a client should be permitted to choose whether to employ an insured or uninsured attorney. In effect, granting the client such a choice gives him the option of selecting the services of an uninsured lawyer (presumably for a lower fee) and thus bearing the risk of having an unsatisfiable malpractice claim against his attorney. While such an argument may have some force when the client is financially sound enough to bear the potential loss, the contention loses its vitality when poor or nonaffluent clients are involved.

73. W. Gates, *supra* note 2, at 2.

have on the bar's reputation would be more than offset by the improved public image caused by the indirect showing of concern for clients' protection made by adoption of a mandatory program.

D. Malpractice Loss Prevention

As noted above, the administration of a mandatory legal malpractice insurance program will provide a state bar association with information that will aid in malpractice prevention. Loss prevention is the best way to attack the roots of the legal malpractice problem; information about the causes of losses is essential to a plan for prevention. Because of the small percentage of attorneys that have insurance and the fact that insurance companies pool several states together for risk spreading reasons, there are no accurate figures on the causes of a state's malpractice problems. Often a large number of claims in State A will have a direct result on premiums in State B.⁷⁴

Only under a mandatory program of self-insurance or with one insurer, it is argued, can a bar effectively discover the causes of its malpractice problems. One commentator contends, however, that simply involving the bar in claims handling would give a bar the information it needs.⁷⁵ In Wisconsin, for example, each attorney policyholder agrees that information about any claim asserted against him may be reviewed by the bar's insurance committee. This system allows the bar to compile information on problem areas and to implement educational programs where necessary. Proponents argue that, under a mandatory self-insurance or one-insurer program, premiums can be made to relate directly to a state's own loss experience. As a result of the direct effect losses would have on premiums, lawyers and bar associations would be more involved in loss prevention under a mandatory program than otherwise. British Columbia's experience with a mandatory program is again illustrative. There, the Law Society, through experience gained in the program's administration, identified the three largest causes of claims and then worked to remove those causes. The Society devised practical systems to prevent lawyer negligence and lobbied for changes in those laws that often caused malpractice problems.

74. For example, "[o]ne legal malpractice insurer sought the same substantial premium increase last year [1976] in Oregon, Washington and Idaho, even though there had been no claim at all against any of its insured lawyers in Idaho in the preceding year." Neil, *supra* note 64, at 5.

75. Stanley, *President's Page*, 63 A.B.A.J. 155 (1977).

The variety of possible loss prevention measures extends beyond the British Columbia experiences. One writer has this vision of other possibilities:

I can see State Bar Journal articles describing case histories and statistical analyses of causes of losses and, more importantly, checklists and procedures for loss avoidance. I can see continuing legal education seminars on the subject. I can also see an increase in the occasions for the consistently careless lawyer to become involved in his bar's disciplinary processes. In short, as local loss experience becomes a matter of direct significance to each local lawyer's pocketbook the business of loss control is going to receive more effective attention.⁷⁶

These and other measures will be made possible or encouraged by mandatory insurance and will have positive effects in reducing the size of the legal malpractice problem.⁷⁷

E. Threat of Legislative Enactment

Failure of the bar to require legal malpractice insurance of its members, it is argued, may result in action by the legislature. The failure of many doctors to carry coverage has resulted in several states now requiring doctors to have malpractice insurance in order to practice.⁷⁸ If a large number of lawyers continue to practice law without insurance while the incidence of malpractice suits increases, similar legislation for the legal profession may well result.⁷⁹ A legislatively enacted program prompted by the bar's failure to act is likely to be less favorable to the bar than a bar-created program. For example, if the legislature simply made malpractice insurance a requirement of practicing law, there would be no cost savings or way to identify losses and implement a loss prevention program. In addition, such legislation would be accompanied by public attention to the failure of lawyers to protect their clients from negligence and unsatisfied judgments, thereby resulting in unfavorable publicity for the bar.

76. W. Gates, *supra* note 2, at 4.

77. All this is not to say that bar associations cannot identify the causes of malpractice without implementing a mandatory insurance program. Because of the larger base of insureds and the increased amount of bar involvement in program administration, the identification of sources of malpractice would likely be easier under a mandatory program.

78. See Goldberg, *Malpractice: Can the States Outlaw Going Bare?*, MED. ECON., Dec. 13, 1976, at 31.

79. See also *Why the Malpractice Crisis Has to Get Worse to Get Better*, MED. ECON., Jan. 24, 1977, at 47.

F. Constitutionality

The constitutionality⁸⁰ of a compulsory legal malpractice insurance requirement or program may well be attacked in the courts. The primary issue would be whether the insurance requirement was an unconstitutional interference with the opportunity of practicing the legal profession. This issue will probably be resolved in the same way as it has been in the medical context.

Several recent medical malpractice insurance cases demonstrate the reception met by doctors' challenges to insurance requirements. For example, in *Pollock v. Methodist Hospital*,⁸¹ the federal district court upheld a hospital requirement that a physician carry malpractice insurance as a condition of his employment at the hospital. The court dismissed the doctor's due process challenge, observing that the

plaintiff has no liberty or property interest sufficient to invoke the due process requirements of the Fourteenth Amendment. While the right to practice an occupation is a liberty interest protected by the Fourteenth Amendment, . . . plaintiff is not precluded from exercising that right by the insurance requirements of the defendant hospital. He need only comply with the requirements in order to continue his membership on the hospital staff. . . . This consideration is sufficient to dispose of plaintiff's possible property interest as well.⁸²

In *Jones v. State Board of Medicine*,⁸³ both physicians and hospitals brought an action for declaratory judgment as to the constitutionality of Idaho's Hospital-Medical Liability Act. The doctors contended that the Act's malpractice insurance coverage requirement constituted a denial of due process because it impermissibly deprived them of their constitutional right to pursue a recognized profession. Although the Idaho Supreme Court agreed that the pursuit of an occupation was a liberty and property interest to which the due process protections of the state and federal constitutions attached, the court stated that the power to require doctors to carry malpractice insurance was clearly within the state's police power. The court compared the insurance re-

80. The validity of the manner of adoption of the mandatory requirement or program may also be at issue. Because of the wide variations in state laws and procedures regarding adoption of such an insurance proposal, a discussion of this issue is beyond the scope of this Comment.

81. 392 F. Supp. 393 (E.D. La. 1975).

82. *Id.* at 396 (citations omitted).

83. 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

quirement to the bonding requirement of other trades and professions. The court observed that the

requirements of obtaining medical malpractice insurance as a condition to licensure bear a rational relationship to the health and welfare of the citizens of the state by providing protection to patients who may be injured as a result of medical malpractice and to this extent does not violate the guarantees of due process of law.⁸⁴

There has been only one case to date invalidating a mandatory medical malpractice insurance program. In *McGuffey v. Hall*,⁸⁵ the constitutionality of legislation enacted by the Kentucky General Assembly, similar to that of the Idaho Legislature in *Jones*, was challenged in two separate declaratory judgment actions. The court viewed the purpose of the legislation to be three-fold: (1) to increase the availability of malpractice insurance, (2) to reduce the cost of malpractice insurance, and (3) to assure that medical malpractice judgments and settlements would be satisfied. Noting both that the requirement of malpractice coverage did not increase the availability nor reduce the cost of insurance and that there was no prior history of unsatisfied claims against doctors or hospitals, the court held, on state (not federal) constitutional grounds, that the legislation was an unjustified exercise of the state's police power.⁸⁶

As *McGuffey* demonstrates, it is possible that, absent proof of unsatisfied claims and an increase in the availability and reduction in the cost of insurance, legislation that only mandates insurance coverage for lawyers may be struck down as in conflict with a state's constitution. Any mandatory program, however, reasonably related to the accomplishment of its purposes should satisfy both state and federal constitutional challenges.

G. Conflict of Interest

Arguably, a mandatory program will create a conflict of interest within the bar. The conflict, it is argued, arises as a result of two factors: (1) the direct effect losses will have on malpractice premiums, and (2) the bar's interest in keeping down both the number and size of claims. The mere fact that an attorney is among the insureds in a self-insured or one-insurer mandatory program arguably may mean that he has a conflict of interest

84. *Id.* at 868, 555 P.2d at 408.

85. 557 S.W.2d 401 (Ky. 1977).

86. *Id.* at 414.

when involved in prosecuting a legal malpractice case because the defendant attorney and both counsel would be covered by the same program or insurer.

However, the fact that the defendant, the defendant's attorney, and the plaintiff's attorney are all covered by the same program or insurer, and nothing more, should not create a substantial ethical problem. Under either a mandatory program or the presently existing systems, the ethical conflict is too indirect to be considered a problem in itself. It would be necessary to show that the plaintiff's counsel, for the purpose of keeping malpractice premiums down by limiting the plaintiff's recovery, had either inadequately represented his client or colluded with the defense counsel.

Indeed, with respect to this possible ethical problem, there is not a great difference between a mandatory self-insurance or sole-insurer program and the situation in a legal malpractice case today. Presently, because of the limited number of malpractice carriers, there is a good possibility that the defendant lawyer and attorneys for both sides will be insured, if at all, by the same company. Even if the defendant lawyer and the attorneys are each insured by different companies, the overall result may be similar. This results because a rate increase granted the defendant's insurer to compensate for its large loss may apply to other insurers as well.

H. Choice of Insurer

Opponents also contend that a mandatory program could result in limiting an attorney's choice of insurer.⁸⁷ This argument is especially forceful where a state bar self-insures or insures with only one carrier. The choice-of-insurer argument, however, loses some of its force when applied to new attorneys and other attorneys who are obtaining malpractice insurance for the first time. Currently only two companies are actively soliciting new business.⁸⁸ Thus, there is not a great deal of choice even at present. If

87. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 152.

88. The companies are American Bankers Insurance Company of Florida (generally through the brokerage of Shand, Morahan & Company, Inc.) and American Home Assurance Company. *Id.* at 15-16; see T. Sheehan, *The History of Lawyers Professional Liability Insurance* 3-4 (Aug. 10, 1977) (paper presented at the annual meeting of the ABA Section of Insurance, Negligence and Compensation Law, Showcase Program for Lawyers, Chicago, Illinois). Other companies, however, continue to provide renewal coverage. The Arkansas, California, Chicago, Florida, and Illinois bar associations have on-going insurance programs with various other insurers. Lloyd's of London will write policies on an individual risk basis; this type of coverage is most frequently used by the larger law firms. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 16.

a state bar, however, simply requires all attorneys to carry malpractice coverage, rather than requiring participation in a mandatory self-insurance or one-insurer program, such action arguably will create a market and induce more insurers to offer coverage, thereby actually increasing the attorney's choice of insurers.

V. ANALYSIS AND SUGGESTED RESOLUTION OF THE PROBLEM

One of the strongest arguments for requiring legal malpractice insurance is that relating to the financial protection of clients. Because currently only a low percentage of attorneys carry adequate malpractice insurance, there is a substantial risk that clients may suffer unremedied malpractice-caused financial injuries.⁸⁹ The counterargument is that there is presently no need for a mandatory insurance program in light of the small number of unsatisfied judgments against attorneys.⁹⁰ Attorneys, it is contended, should not be compelled to purchase insurance where there has been little, if any, evidence of injury to the public. Lawyers as a profession, however, have a responsibility to act *before* there is a public outcry or legislative enactment.

The cost of insurance arguably will be less under a mandatory program. The effect that an increase in the number of attorneys insured will have on the cost of insurance is disputed. The increased base may reduce the cost by spreading the risk. On the other hand, including lawyers in the base that are presently uninsured may increase the number of poorer risks and thus increase the cost. In addition, clients and attorneys may be less hesitant to sue attorneys for malpractice, knowing that all attorneys are insured. The experience of the Law Society of British Columbia, however, indicates that a mandatory program may reduce the cost of legal malpractice insurance.

Another argument in favor of mandatory insurance is that loss identification and prevention will be facilitated by a mandatory program. Loss identification and prevention measures, it is true, can be implemented without imposing an insurance requirement. Nevertheless, these measures will be easier to implement under a mandatory program. The direct effect a bar's losses will

89. To the extent that increasing numbers of malpractice claims indicate a greater incidence of malpractice, the risk to clients may actually be growing.

90. The number of unsatisfied judgments may be a poor indicator of the degree of public injury caused by attorney malpractice, however. Many injured clients may choose to bear the loss rather than prosecute a malpractice action to its conclusion. Moreover, the negotiation process may result in only partial remedies for injured clients who do bring actions but settle them.

have on its attorneys' premiums will also be a strong motivator to make a loss prevention program work.

In light of the increased financial protection afforded clients, the possible reduction in insurance cost, and the better opportunity to reduce malpractice through loss identification and prevention programs, it seems reasonable to impose a legal malpractice insurance requirement on practicing attorneys.

VI. IMPLEMENTATION OF A MANDATORY PROGRAM

Once the decision is made to adopt a mandatory legal malpractice insurance program, a bar association must face some additional decisions in implementing its program. This section reviews a few of these decisions.⁹¹

A. *Type of Mandatory Program*

Each bar that adopts a mandatory *program*, as opposed to a simple insurance *requirement*, must decide whether to implement it with a commercial carrier or through some other alternative,⁹² such as a self-insurance fund as in Oregon or a combination of self-insurance and commercial insurance as in British Columbia.⁹³ Because few insurance companies are currently writing new legal malpractice policies, a bar association's options may be limited. Added to this limitation is the fact that insurers are apparently unwilling to forego their underwriting discretion as a mandatory program might demand. Representatives of American Bankers Insurance Company of Florida and American Home Assurance Company, the only two companies writing new policies, have expressed such an unwillingness.⁹⁴ Since a mandatory pro-

91. A bar must also decide on the (1) amount deductible, (2) amount of coverage required, (3) exclusions from coverage, (4) procedure for enacting the requirement (legislation or supreme court petition), (5) type of coverage (claims made, occurrence, etc.), and (6) availability of excess coverage over the minimum requirement.

92. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 109; Stern & Martin, *Solutions to the Attorney Malpractice Insurance Crisis*, BARRISTER, Fall 1977, at 44.

93. Implementation of the British Columbia system in the United States would raise significant questions of insurance law, particularly if the bar associations had to qualify as insurance companies under state law. Stanley, *supra* note 75, at 155. The Oregon Professional Liability Fund, it should be noted, will be exempt from that state's insurance code. See ORE. REV. STAT. § 9.080(1) (1977).

94. Telephone interview with Allan Pither, Vice President of American Bankers Insurance Co. of Florida (Oct. 6, 1977) (notes on file in the office of the *Brigham Young University Law Review*); telephone interview with Leo J. Gilmartin, Representative of American Home Assurance Co. (Oct. 5, 1977) (notes on file).

gram would require that all active members of the bar be able to obtain coverage from the carrier,⁹⁵ implementation of such a program with a commercial carrier would necessitate overcoming the companies' hesitancy. It is possible that either company would alter its position if presented with a program similar to that of British Columbia with its large deductible feature.

If a commercial carrier will not forego its underwriting discretion, a state bar association will be confronted with a dilemma. If the bar requires each attorney to carry malpractice insurance, the insurance companies in effect will be controlling who practices law in that state. An insurance company's decision not to insure an attorney would effectively bar him from practice. If, as is probable, the bar association is unwilling to cede that power to the insurer, it may be impossible to implement a mandatory program through a commercial carrier.

One alternative to this dilemma is for the bar to self-insure. Many state bar associations have plans to self-insure or are studying the possibility.⁹⁶ The experience of Oregon's self-insuring fund and those of other states that adopt this alternative will provide useful information as to the viability of self-insurance.

B. Exemptions

If a mandatory program is instituted, a state bar must also decide which attorneys will be exempted from the insurance requirement. The plans proposed in Oregon, California, and Washington all suggest decisions different in form but substantially the same in effect.

Oregon's self-insuring professional liability fund excludes house counsel, public defenders, legal aid lawyers, and government lawyers. Although patent attorneys are not required to contribute to the fund, they will be required to provide evidence of similar coverage.⁹⁷ This exception for patent attorneys is based on their practice's unique nature and on the availability of similar coverage through a national association.⁹⁸

95. SPECIAL COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, *supra* note 69, at 152.

96. See text accompanying note 21 *supra*.

As might be expected, some insurance executives do not think self-insurance is a viable alternative for most bar associations. Telephone interview with Allan Pither, Vice President of American Bankers Insurance Co. of Florida (Oct. 6, 1977). In Pither's view, many attorneys and bar associations think there is something "magic" about self-insurance. Pither also indicates that a bar association needs at least 5,000 members to be able to self-insure effectively. At present, only 24 associations are over that threshold. See note 24 *supra*.

97. Statement of the Board of Governors, *supra* note 49, at 2.

98. *Id.*

The original California proposal, Knox's unamended bill, excluded attorneys employed by any governmental agency or entity; state, local, or federal officers; and any lawyer representing only his employer.⁹⁹ This employer category would have included corporations, labor unions, cooperatives, and other similar entities.

Washington's proposed plan basically excluded attorneys who had no more than one client.¹⁰⁰ In dealing with the problem of who constitutes a client, the Washington bar decided that donated legal work for a nonprofit organization would not make that organization an additional client.

Each program seems to have the same underlying policy, *i.e.*, that certain attorneys are not generally subject to malpractice claims and therefore should not be required to carry malpractice insurance. It does not seem to make much difference whether this policy is expressed in terms of attorneys not in private practice or attorneys who have only one client.

C. *Bar Defense and Discipline of Insured Attorneys*

Another problem, more subtle in nature, may occur under a mandatory self-insurance program. The problem arises when a self-insuring bar defends a malpractice claim against one of its members; in such a situation, the bar may be ethically prohibited from using information obtained in that defense in a subsequent disciplinary proceeding against the attorney involved.¹⁰¹ While the problem may arise under a voluntary self-insurance program, it is more likely to occur under a mandatory system.

The problem, however, can be avoided if the bar association retains outside firms to defend malpractice claims. Information thus obtained by defense counsel would be protected by the attorney-client privilege, and its disclosure would violate a disciplinary rule.¹⁰² In order to prevent this problem from arising, a bar should retain a firm to do its defense work and remind the firm

In addition to excluding certain attorneys, Oregon will also assess new bar members only one-half of the regular contribution required under the program to be implemented. Requiring a lower premium of new attorneys appears reasonable in light of the straitened financial circumstances of most new attorneys.

99. Knox, *supra* note 54, at 4.

100. W. Gates, *supra* note 2, at 7.

101. It is likely that more vigorous disciplinary action will be taken against the consistently careless or incompetent lawyer under a mandatory program. See text accompanying note 76 *supra*.

102. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B).

that it has no duty to reveal to the bar information obtained in the process of defending malpractice claims.

VII. CONCLUSION

Legal malpractice and malpractice insurance are serious problem areas. The cost of malpractice insurance continues to increase dramatically. As a result attorneys are going without insurance and more are likely to "go bare" in the future. As more attorneys practice without insurance coverage, the public stands a greater chance of suffering an unremediable injury at the hands of a negligent attorney.

Practicing law is a privilege that carries with it responsibilities. Mandating legal malpractice insurance will help lawyers protect themselves and the public. Making insurance mandatory may significantly reduce premiums. More important, however, is the possibility that loss control programs made possible by a mandatory program will significantly reduce legal malpractice. The more directly the bar and its members are involved, the greater the likelihood of reducing the incidence of legal malpractice.

As each state bar association considers plans for providing malpractice coverage for its members, serious consideration should be given to a mandatory program. The benefits of such a program appear to greatly outweigh the detriments.

Thomas L. Kay